

FILED

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

KIRK TOSTIGE,

Plaintiff,

8:12-CV-2103-T-23 TGW

v.

UNITED STATES POSTAL SERVICE

Defendant,

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Kirk D. Tostige brings this action against Defendant United States Postal Service to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). As grounds therefore, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1346.
2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B)
3. Plaintiff is an employee of the United States Postal Service and seeks only records regarding himself, which he also would be given access to in any Discovery process

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during legal proceedings. Plaintiff's request in part is to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

4. Defendant is an agency of the United States Government and is headquartered at 475 L'Enfant Plaza, S.W., Washington, D.C. 20260. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. Plaintiff filed on February 29, 2012 a FOIA request (**2012-FPRO-00541**) to Defendant, by Priority Mail Delivery Confirmation (Exhibit 1) and the US Postal Service received the FOIA request on March 8, 2012 (Exhibit 2).

6. On March 29, 2012 FOIA, Consumer research Analyst; Nancy P. Battle sent a estimate for two FOIA's requested. This Action before the Court only involve the fore mentioned FOIA. The cost was \$132.31 for this FOIA, along with another unrelated FOIA the total cost was \$261.36, which Plaintiff sent off (Deliver Confirmation) as check #787 on April 14, 2012. (Exhibit 4). Agencies are required to make a good-faith effort and exercise due diligence in processing requests on a first-in, first out basis." *Appleton v. FDA*, 254 F. Supp. 2d 6, 8-9 (D.D.C. 2003). Ms. Battles always explained away the delays as to her caseload that she was working on during Plaintiff's request, directly in contradiction to "*Appleton v. FDA*".

7. After no response past the 20 working-day time limit, Defendant enlisted help of his Congressman, the Honorable Gus M. Bilirakis. His office sent Plaintiff a Privacy form to fill out allowing them to speak to FOIA Consumer research Analyst; Nancy P. Battle. Ms. Battle explained to the Congressman's Office that it was being processed and that

she had a heavy workload and other FOIA's to deal with at the same time as Defendants.

Ms. Battle repeated numerous times on the phone to Plaintiff the same excuse: "That I have other FOIA's to do besides yours. Quit calling me for at least 4 weeks." At no time during the past six months was a letter sent to Plaintiff explaining "Exceptional circumstances" for the delay.

8. July 16, 2012 the U.S. Postal Service finally responds to Plaintiffs FOIA. Defendant USPS responded to Plaintiff's request and turned over some, but not all of the documents requested by Plaintiff. Multiple claimed exemptions were 3, 5 and 6. The Agency also stated: "D9 are non-responsive information to the request". (Exhibit 6).

9. July 23, 2012; Plaintiff formally files FOIA Appeal to General Counsel in a seven page letter outlining his objections and reasoning to the USPS General Counsel in their decision to claim exemptions for simple emails between individuals concerning Plaintiff during period when he was requesting help in a Reasonable Accommodation. This document was sent Priority Mail Delivery Confirmation # 0311 3260 0001 4113 8895. The General Counsel received the Appeal on July 26, 2012; confirmed by USPS.com Track and Confirm. (Exhibit 8).

10. August 22, 2012; General Counsel Christopher T. Klepac, Chief Counsel sends Plaintiff letter requesting 10 more working-days pursuant to 39 CFR § 265.7(f)(a) and 39 CFR § 265.7 (b) (5).

11. 30 working-days from July 26, 2012 when General Counsel received the Appeal

was September 6, 2012. (Exhibit 9).

12. As of the date of this Complaint, Defendant has failed to produce any records responsive to Plaintiff's July 23, 2012 FOIA Appeal or demonstrated that responsive records are exempt from production. Nor has it indicated whether or when any responsive records will be produced. In fact, Defendant has failed in responding to Plaintiff's FOIA Appeal in any substantive manner, although Plaintiff tried to contact General Counsel's office on Sept. 10, 2012 as a courtesy to inform him that Plaintiff was reluctantly considering filing a civil suit in regards to the non-response. Plaintiff was not permitted to speak to Counsel.

13. USPS Agency Counsel, Dana E. Morris had on earlier occasions promised to produce these very same emails in Discovery regarding an EEO filing Plaintiff initiated. Counsel Morris promised in written depositions and other correspondence that these same emails were provided to him by USPS Respondents and he stipulated that Plaintiff would receive them, but none were ever forthcoming. In Deposition one Respondent admitted that he conspired with another Respondent in regards to these emails concerning the Rehabilitation Act of 1973. Thus, while these emails may be embarrassing to USPS, they are important when considering that the redacted emails may shine some light on possible illegal acts being committed by USPS personnel. These are the types of situations that were envisioned to be sun shined when the FOI ACT was created.

COUNT 1

14. Plaintiff realleges paragraphs 1 through 12 as if fully stated herein.

15. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

16. Pursuant to 5 U.S.C. § 552(a)(6)(B)(i-iii) U.S.C. § 552(a)(6)(C) Plaintiff is deemed to have exhausted any and all administrative remedies with respect to his July 23, 2012 FOIA Appeal to Defendant USPS.

Wherefore Plaintiff prays that this Court:

1. A request for an order enjoining the agency from relying on an invalid regulation or practice in all future FOIA undertakings. Cf. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).
2. An order declaring the agency's actions to be in violation of FOIA Laws.
3. Declare that Defendant's refusal to disclose the documents requested by Plaintiff is unlawful.
4. Order defendant to make the requested documents available to Plaintiff.

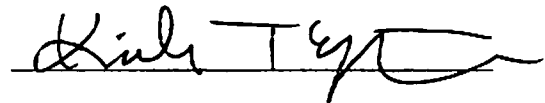
5. An award of attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

Attorney fees may be awarded when the plaintiff has "substantially prevailed." Id.

6. Grant such other relief as the Court may deem proper.

7. Order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption.

Respectfully submitted this 18 day of SEPT, 2012.

A handwritten signature in black ink, appearing to read "Kirk Tostige", written over a horizontal line.

Kirk Tostige, pro se

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